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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Policies and Rules Implementing	)	CC Docket No. 93-22
the Telephone Disclosure and Dispute	)	
Resolution Act	)	

REPLY COMMENTS OF U S WEST, INC.

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October 31, 1994

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I. INTRODUCTION AND SUMMARY

U S WEST, Inc. (or "U S WEST"), through counsel, herein responds to those comments filed response to the Federal Communications Commission's ("Commission") Order on Reconsideration and Further Notice of Proposed Rule Making in the above-referenced proceeding.[1] We limit our comments to three issues:

First, the notion advanced by some commentors that, in responding to abusive practices of some service providers, it is acceptable regulatory and public policy to fashion broad prohibitive polices, despite the fact that such policies predictably can be expected to thwart innovation and communication. U S WEST believes that, whatever the theoretical propriety of such a position with respect to some markets

[1]In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Order on Reconsideration and Further Notice of Proposed Rule Making, 75 Rad. Reg. 2d (P&F) 1247 (1994) ("FNPRM").

and some practices, when the services being constrained are those involving "speech" and "communications," regulatory bodies must act in a more constrained manner than is suggested by some commentors.

Second, the fact that the Federal Communications Commission ("Commission") suggests, and commentors support, "solving" the 800 information provisioning problem by creating a down-stream enforcement mechanism, rather than securing the cooperation of the Federal Trade Commission ("FTC") to act directly on the putative violators of existing rules and regulations, especially as those rules or regulations have been fleshed out through agency interpretations.

Third, that "written" contracts are an appropriate vehicle, or are appropriately mandated, in the context of mass market telephonic and electronic communications services. "Written" contracts are a formidable barrier to communication; and their imposition should be exceptional and targeted, as such imposition implicates First Amendment protections. To the extent a governmental agency imposes a requirement for the execution of a written agreement prior to the engagement of communication, the agency must consider, and have a sound basis for rejecting other less-restrictive alternatives that might solve, or substantially alleviate, the problem.

As is clear, the concerns we have with regard to the filed comments are not those confined to the provision of common carriage or the burdens that the Commission's proposed rules might place on third-party billing providers. They are more fundamental, in that they go to the very foundation of certain of the Commission's proposals, and the support that has been expressed with regard to those proposals.

U S WEST's interests are evident. While U S WEST, Inc., itself is a regional holding company, we have within our family of companies not only a communications common carrier, i.e., U S WEST Communications, Inc., but other companies which are currently involved with the provision of information services, and which will only become increasingly so. Such services will, sometimes, resemble traditional off-network information services; sometimes they will resemble 900-type services. And, a new generation of information services, i.e., interactive information services, will also be offered through U S WEST companies, as well as carried on our public networks. For those reasons, U S WEST believes that it is imperative that the Commission consider its proposals not just within the fairly circumscribed parameters of the instant proceeding, but with respect to their fundamental and logical implications. We are seriously concerned about those implications.

Fundamentally, we agree with International Telemedia Associates ("ITA") that "in the future, when one looks back on the advent of the information age, 900 pay-per-call transactions and 800 Transactions will be considered the dinosaurs of that era. Yet what regulations [the Commission imposes today] will effect the development of the applications of the future. . . . [That] future . . . depends upon diversification; diversification in the modes of delivering information to consumers and diversification in the billing platforms that support them. It is incumbent upon the Commission . . . to regulate in such a manner as to protect consumers yet not stifle this new and burgeoning industry."[2]

II. SPECIFIC MATTERS OF CONCERN

A. Controlling Individual-Provider Abuses Through Broad-Based Industry Proscriptions and Prescription

A number of commentors supporting the Commission's proposals acknowledge that the current 800 information service provisioning and billing "problems" are the result of the "abusive"[3] or "unscrupulous"[4] behavior of a smattering of providers.[5] Despite that fact, most of these same commentors support broad-based

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[2]ITA at 2. See also InfoAccess, Inc. ("InfoAccess"), at 6 ("If adopted as proposed, the [Commission's proposal] will have the unintended result of impeding consumers and businesses from accessing the information highway and limiting the growth of the network's essential infrastructure. In addition, the microeconomic effect of the administrative costs associated with the [Commission's] proposed changes will stifle opportunities for small [Information Providers] IPs and [interexchange carriers] IXCs to enter and develop their services on the information highway."); Interactive Services Association ("ISA") at 3-4 (noting the emerging nature of the interactive services industry and suggesting that the Commission impose its "written agreement" requirements only on voice-based information services).

[3]See Minnesota Attorney General ("MN-OAG") at 1 ("continuing abuses by some providers of . . . services"), 8 ("information providers are becoming more bold with respect to abuse of the telephone subscribers"); American Public Communications Council ("APCC") at 1.

[4]See National Association of Consumer Agency Administrators ("NACAA") at 1; American Petroleum Institute ("API") at 7; State of New York Department of Public Service ("NYDPS") at 2; Pennsylvania Public Utility Commission, the Pennsylvania Telephone Association, and the Pennsylvania Office of Consumer Advocate ("Pa. Joint Commentors") at 3; MN-OAG at 21 (reference to "unscrupulous providers").

[5]See ISA at 1, 3 (noting that the problems associated with 800 information services have stemmed from the business practices of a "handful" of service providers); ITA at 1 (noting that the Commission is acting relative to what it perceives as "fraudulent and deceptive acts of information providers"); NYDPS at 2 ("deceptive practices"); MN-OAG at 2 ("deceptive practices"); New York Clearing House Association ("NYCHA") at 2 (referencing "phone scam[s]"); Consumer Action ("CA") at 2 ("pay-per-call scam artists"); The Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO") at 2-3 (noting that some information service providers have "found it possible to

Commission initiatives -- initiatives that will increase the costs of service and delivery for all information service providers providing 800 service, and for all those who bill for them -- on the undemonstrated grounds that it is necessary to take such a broad-based approach to solve the problems caused by a limited number of bad actors. The general theory is that it is best to prohibit certain behavior up front than to deal with abusive practices after the fact.[6]

Whatever theoretical support there is for such a position within the context of criminal law, for example, or even with respect to industry practices as a general matter, when the behavior that a regulatory body seeks to prohibit "in advance" is behavior that is taking place within an information and communications market and that prohibition takes on the form of a "prior restraint" (either directly or through the creation of barriers to the ability to engage in the speech itself), the lawfulness and the sagacity of the proposed prohibition is severely called into question.

Certain commentors to this proceeding have advised the Commission that if its rules are put into place as written, they will cease to provide information services through 800 numbers, a practice that is currently legal, albeit abused by some. Thus, it is clear that the "effect" of the Commission's proposed rules could well be to decrease the existing levels of communication in the marketplace. Given that effect,

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boldly skirt" existing Commission "already carefully worded presubscription requirements"); Pilgrim Telephone, Inc. ("Pilgrim"), at 2 ("fraudulent and deceptive practices"), 4.

[6]See FNPRM, 75 Rad. Reg. 2d (P&F) at 1252 ¶ 26. See also Pa. Joint Commentors at 7 n.3.

it is immaterial that the Commission may have arrived there indirectly (i.e., through the obligation of written contracts, and local exchange carrier ("LEC") or interexchange carrier ("IXC") enforcement responsibilities), rather than directly (i.e., through the prohibition of any charged-for information service offering via an 800 dialing pattern). The end result is the same: decreased speech and communications in the overall marketplace.

This is a heavy price to pay for the misfeasance and improprietous behavior of a limited number of service providers. U S WEST encourages the Commission to revisit its fundamental assumption: that constraining a large number of persons, and imposing general prohibitions on a marketplace, to control/change the behavior of a few bad actors, is an appropriate regulatory or public policy. We do not believe that it is; and we hope the Commission comes to the same position.

B. Using Down-Stream Participants to Control Primary Behavior

In the Commission's FNPRM, it noted that it lacked general plenary jurisdiction over the behavior or service offerings of information or enhanced services providers.[7] Thus, it deemed it appropriate to exert jurisdiction over those entities that billed for certain 800 services, rather than seeking the support of a sister agency, the FTC, that had direct jurisdiction over the providers of service.[8]

[7]FNPRM, 75 Rad. Reg. 2d (P&F) at 1248 n.3, 1253 ¶ 30.

[8]Not only does the FTC have direct enforcement authority over such providers, it has a considerable history in defining what constitutes unfair and deceptive trade practices, issuing interpretive opinions on the matter, and proceeding with enforcement actions against those who violate the rules.

Again, there is support for this position from a number of commentors.[9] U S WEST, however, does not believe that this is a sound approach to regulation. Any time governmental enforcement with respect to a certain behavior is sought via down-stream participants in the process, the responsibility for such enforcement, as well as the costs associated with such enforcement, are improperly placed.[10] Because of that fact, it is predictable that the down-stream participants will refuse to incur the costs of enforcement, and will simply exit the business.[11] As a result, while it is true that the regulatory entity may have secured indirectly something it was not capable of securing directly, the wrong message is sent both to the primary market participant, as well as to those who support the vast majority of legitimate providers.

That many would define the current problem as involving only abusive and deceptive trade practices is clear. See notes 2-4, supra.

[9]See NACAA at 1, 4 (urging that no 800 number information service calls should be allowed on telephone bills). See also National Association of Attorneys General Telecommunications Subcommittee ("Attorneys General") at 1-2, 8-10; United States Telephone Association ("USTA") at 2, 4-5; Allnet Communications Services, Inc. ("Allnet"), 1-2; National Telephone Cooperative Association ("NTCA") at 3; The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") at 2 (suggesting that such an approach might be the best); MN-OAG at 2, 20-21 (all to the same effect). Compare Rochester Telephone Corporation ("Rochester") at 2-3 (800 information service calling requiring payments be billed only to commercial credit cards).

[10]See InfoAccess at 5-6; Southern New England Telephone Company ("SNET") at 1-2; Pa. Joint Commentors at 8; Rochester at 1-2 (and noting that demands for documented compliance between billing agent and principal provider causes alienation that becomes insinuated in the process, even when dealing with the most lawful of service providers) . While we do not necessarily support Rochester's suggested solution to the 800 information service provision problem (i.e. that such calls only be billed to commercial credit cards (id. at 2)), we do support the observation here discussed.

[11]See SNET at 2, 4-5; Pa. Joint Commentors at 8. U S WEST does not share USTA's concern that the Commission's proposed rules could be considered to mandate LECs to bill for anyone or for any service. Rather, we understand those rules as applicable only in those circumstances where a LEC has made a business decision to do such billing. See USTA at 2. As with all other business decisions, a

Prohibitions should be directed to those who engage in the improper behavior. The "fundamental" improper behavior with respect to abusive 800 information services is not the billing of those services (the vast majority of which is proper and not abusive to consumers; a problematic minority of which is the result of LEC innocence and inadvertence),[12] but the failure of the information provider to have properly entered into a "presubscription or comparable arrangement" with either the party being billed or the individual receiving the service.[13]

Thus, any governmental constraints that might be imposed in this area are constraints that should apply directly to the provider of service.[14] Such constraints,

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decision to continue to bill for 800 information services would be educated by the ultimate iteration of the Commission's rules.

[12]See Pa. Joint Commentors at 8. See also id. at 2 (suggesting that there could well be reasonable differences of opinion with respect to 800 information services provisioning and billing practices). While not mentioning U S WEST by name in the text of its comments, MN-OAG references, and attaches, certain U S WEST-issued documents that it believes are misleading with respect to 800 information service billing practices. See MN-OAG at 6-7, Exhibits 1 and 3. U S WEST understands the basis for MN-OAG's allegations, as we have been in communication with that office with respect to our billing and collection practices in the area of billing for 800 information services. A few words should suffice here as a response to the allegations, as we continue to discuss the issues with MN-OAG. With respect to our bill (which displays an IXC's charges as if they were calling card charges), U S WEST did not -- at the time of billing -- know that the charges in question were information service charges. With respect to our disconnect notice, U S WEST has attempted to fashion a disconnection notice that is simple and states directly what needs to be done. We do not consider the notice to be misleading, and believe that our use of **bold** print to show items subject to disconnection allows the reader to quickly and clearly identify those services at risk for disconnection. In the example attached by MN-OAG, neither the local service nor certain IXC services were highlighted.

[13]While U S WEST does not necessarily support NTCA's recommended solution to the purported 800 information service problem, we do agree with them that it is fundamentally not a billing problem, but a provisioning one. NTCA at 3-4. And see InfoAccess at 5-6 (it should be the information service providers' obligation to comply with laws and to prove their compliance).

[14]The NYCHA states that the Commission's proposed rule would place "the burden on the information service provider to demonstrate written evidence of a presubscription arrangement with an authorized subscriber." NYCHA at 4. But the Commission's proposed rule does no such thing. It places no "burden" directly on the provider of service. Rather, as NYCHA noted on its preceding page, the Commission's proposed rule runs to the billing entity, mandating that no billing take place "unless the carrier receives proof of written authorization by the telephone subscriber." Id. at 3. See

and their concomitant costs of compliance, should be imposed on those individuals, not on entities who render bills based on reasonable assumptions that appropriate relationships have been forged.[15]

Thus, U S WEST encourages the Commission to conclude this current proceeding, and to ask the FTC to devise rules and regulations outlining -- in more precise terms -- the requirements that an information or enhanced service provider must comply with to create (or prove) a "presubscription or comparable arrangement."[16] Indeed, it is quite possible that that agency, i.e., the one with primary ju-

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also id., noting that "new burdens will be imposed on legitimate service providers and common carriers" under the Commission's proposed rules.

[15]By this statement, U S WEST does not mean to imply that billing entities have no obligation to assure themselves that what they bill for is appropriate under the law. Nor would it be inappropriate, if a billing company deemed it necessary, for a billing agent to require its principal to have written, documentary evidence of a contractual agreement between the principal and the customer, before the billing agent would be agreeable to bill charges on behalf of the principal. Such would be a matter of private contract, and private negotiation, and would not implicate the First Amendment protections addressed in Section II.C., below.

We do mean to suggest, however, that a billing agent needs to become a repository for such agreements to reasonably assure itself of compliance. Compliance can reasonably be assured through the terms of the contractual provision itself, and the requirement that both parties abide by the express terms of the contract, as well as with any company-mandated practices and procedures that are a constituent component of the contract. (Compare USTA at 3 (LECs should be permitted to rely on representations that compliance with statutory and regulatory requirements has been met); Bell Atlantic at 2-3 (to same effect).) In the absence of compliance with either, a company clearly is entitled to cancel the arrangement for breach of the agreement (in which case all billing ceases). While such private contractual provisions might play a part in fashioning and defining individual information service provider's practices, such provisions cannot be expected (nor were they designed with the express intention) to force compliance of regulatory rules and regulations by an entire industry, especially with respect to service providers intent on violating established Congressional and/or regulatory rules and regulations. See SNET at 3; Pa. Joint Commentors at 12-13.

[16]See InfoAccess at 5-6; SNET at 3-4, 7-8. Or, as suggested by NTCA, the Commission might seek direct Congressional authorization to exert such authority or should cooperate with the FTC in this area. See NTCA at 4-5. Indeed, as has been made clear by the recent cable legislation, and would have been the case had certain of the telecommunications reform legislation been enacted, Congress seems increasingly willing to accord the Commission with more extensive authority over various telecommunications and electronic communications providers (other than common carriers) than has been the case in the past. Whether such is an appropriate extension of authority as a general matter

risdiction over information and enhanced service providers, and their business practices, may not deem -- for example -- a "written" contractual agreement to be necessary or appropriate, especially after a more industry-focused cost/benefit analysis of current, and future, trade practices was conducted.

C. Written Contract Requirements Impose a Barrier to Communication

As indicated above, it would not be inappropriate for a billing agent voluntarily to require that its principal, e.g., an 800 information service provider, pass the billing agent charges to bill on behalf of the principal that were based only on a written contract between the provider and the individual customer.[17] Such a requirement might be imposed, for example, if the billing agent's cost of service did not include margins sufficient to deal with complaints from consumers, bad publicity, etc.; or, simply, if the billing agent did not want to be involved in the continuing hassle over the service being billed.

While such might be an appropriate term and condition required by one private party with respect to its contractual relationship with another, a written agreement requirement imposed by a governmental entity on private speakers is an entirely different story. There, the question is no longer whether the requirement seems like a good idea, or even whether the requirement is in the public interest,

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need not really be addressed within the scope of this proceeding, as here the Commission is operating under an existing Congressional mandate, which can be modified to the appropriate circumstances.

[17]See note 11, supra.

but whether the imposition of the requirement is constitutional. Can the governmental interest sought to be advanced reasonably only be advanced through the mechanism of written agreements, or are there other, less restrictive alternatives that could be utilized? In this case, and considering the specific matter under review, U S WEST believes that there are such less restrictive alternatives. As such, we believe that the Commission's authority to mandate the use of written agreements is legally very problematic.

Regardless of their general high level of "proof" with respect to the creation and existence of a contractual relationship,[18] written contracts can be difficult and expensive to secure. While such contracts may well be appropriate in certain circumstances, (with respect to the purchase of tangible commodities, for example, or with respect to transactions that occur face-to-face between participants), their use (and their usefulness) in an information market and information economy is not self-evident and is intuitively and assertedly problematic.[19] The responses of those information providers who would be required to secure such contracts suggest that the problem is more than intuitive; it is demonstrable.

Written contracts are not generally used within the context of most telecommunications products and services.[20] They are not standardly used within the con-

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[18]See InfoAccess at 11.

[19]See ITA at 8-9; MCI Telecommunications Corporation ("MCI") at 5-6. CA indicates that is sees no reason why a written contract "should serve as a barrier." CA at 2-3. But the fact is that written contracts are a barrier to the easy, spontaneous creation of telephonic and electronic relationships.

[20]Compare MCI at 5-6.

text of electronic communications products and services. They are not generally used within the context of cable communications products and services.[21] All these markets have, at least in certain circumstances, adopted a structure of verbal communications by which contractual relationships are established. And, to the extent that is not the model followed, the decision to depart from it has been voluntarily made. Thus, the Commission's current proposal is in stark contrast to predominant market conditions, consumer expectations, and commercial practices.[22] It is, in fact, a practice antithetical to the provision of spontaneous calling or access.[23]

While it is true that, in certain circumstances, the decision to go with a model based on verbal contracts can (and will) result in fraud, or in the wrong party -- at

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[21]The only time an affirmative representation of consent is required within the context of the delivery of cable services is if a cable company wants to provide subscriber-specific information to a third party. In that case, the customer must "consent" (compare "agree"), via either written or electronic consent. See 47 USC Section 551(c).

[22]See InfoAccess at 11 ("Requiring written evidence of presubscription arrangements . . . implicates the highest costs to consumers, IPs, IXCs and LECs and is unduly burdensome when less Draconian methods of confirming presubscription arrangements are readily available, less costly, and equally effective."); MCI at ii (a written agreement in all circumstances is a draconian measure), 3-4 (a written agreement rule would seriously impede the manner in which business in an electronic marketplace will be conducted and such would have a negative effect on legitimate commerce), 7; 900 Capital Services, Inc. ("Capital") at 2-3 ("requiring the agreement to be in writing is extremely burdensome and . . . there is an effective, less onerous alternative[;]" noting the particular unsuitability of such contracts with respect to mass market and telephonic/electronic communications services, both from the provider's and the customer's perspectives).

[23]The fact that such access would be available without a writing to the extent that a caller used a commercial credit card (assuming that those LECs currently billing for 800 information services exited the market in the event that the Commission's "written agreement" and verification proposals were put into effect), suggests that the 800 information services calling might simply migrate to commercial credit cards, such as those offered by the members of NYCHA. A written agreement requirement, then, can simply be deemed to increase an information provider's cost of doing business (either by increasing its current costs and those of its billing agent, or as the result of its being forced to do business with a commercial credit card vendor). See NYDPS at 2 (noting that all non-written agreement billing would have to be done via commercial credit card).

least initially -- being thought to be the party subject to the contractual relationship, that "cost" is de minimus compared to the cost of imposing written documentation between all participants with respect to the delivery of products and services. And, where the product or service being delivered is one involving speech and communication, and where there are clearly other less restrictive alternatives that can -- if not absolutely, at least with some degree of predictable success -- "solve" the problem, a mandate that written contracts be used imposes a formidable barrier to the exercise of First Amendments rights, both the right to speak and the right to access speech.[24]

Certain commentors support the elimination of 800 information services or the compulsory use of written contracts prior to their delivery, on the grounds that interested information and enhanced service providers can use 900-type access, and such services will not have the written agreement obligation.[25] However, U S WEST does not believe that that is the proper formulation either of the issue or the proper identification of alternative solutions. The issue is: **"Given the existence of other less restrictive alternatives available to the Commission (as**

[24]The kind of presubscription process the Commission is considering is one that has, generally, been sustained only with respect to "adult" information services. Such services, obviously, involve a particularly sensitive type of content, and often involve access to that content by minors. While certain of the 800 services under discussion in this proceeding (as evidenced by certain comments and proffered advertisements (see NACAA at 3; MN-OAG at 4, 13-14, Exhibit 4; Attorneys General at 2-3; National Association of Regulatory Commissioners ("NARUC") at 7)) involve adult content, the Commission could clearly restrict the need for written contracts to that type of content. It need not, indeed U S WEST believes it cannot, sustain a general requirement that "all content" be available only upon the execution of a written document. Such a solution is clearly over broad.

[25]See CA at 2; CPUC at 2; Attorneys General at 8-10; Pa. Joint Commentors at 9, n.5.

an arm of the government), can the Commission choose the most burdensome alternative, thereby constraining currently lawful speech?" The answer is, **"No, it cannot."**

Certain commentors in this proceeding have advised that if the Commission's "written contract" requirement stays in place, they will exit the 800 information services business.[26] Such exit will, clearly, mean that there is less speech available, and therefore less access to such speech. Given the fact that the market is already engaging in certain corrective actions,[27] that industry self-regulatory initiatives are underway,[28] that alternatives to the "written agreement" proposal have been iden-

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[26]See Sprint at 2 ("Sprint will be required to withdraw its information service products if the proposed rules are adopted," primarily as a result of the written agreement requirement). And see Capital at 4 ("the Commission's proposal is tantamount to a ban on the use of presubscription for pay-per-call services."); The Association of Information Providers ("AIP") at 2 (noting that "For all practical purposes, the proposed changes will eliminate presubscription arrangements as a means of providing service."), 3; ITA at 1-2 ("by virtue of the undue burdens placed on IPs, consumers, and common carriers," the Commission's written contract requirement "will effectively thwart the commercial viability of the 800 Transaction."), 8 ("The cost of compliance would drive the IP away from offering the transaction as a product.").

[27]For example, the record shows that current activities in the marketplace are already in operation such that the 800 information service provisioning "problem" is moving in the direction of market self-correction. See NACAA at 3 (noting that LECs and IXCs are increasingly reversing (i.e., crediting) charges to individuals for improper calls; that MCI no longer accepts such billing, when the basis for the billing is Automatic Number Identification ("ANI"); that AT&T has adopted certain policies that operate to constrain the improper passage of information from service providers, which may ultimately be billed by AT&T; that LECs (including U S WEST Communications, Inc.) "have set more stringent guidelines for the information providers for whom they bill"); USTA at 2 (a number of its members have voluntarily decided not to bill for 800 information service calls, but suggesting -- U S WEST believes ill advisedly -- that only the Commission can accomplish a similar result across the board). And compare the suggestion that the Commission's long distance presubscription model already provides an appropriate model for 800 information service provisioning and billing and that nothing further is required. See InfoAccess at 12-14 (noting that it has already adopted the Commission's presubscription model in its tariff).

[28]See InfoAccess at Appendix; ISA at 2-3, Appendix 1.

tified,[29] and that the Commission has already, through its interpretative authority, put an end to ANI-PIN 800 information services billing, at least on an immediate and stand-alone basis,[30] the basis for most of the problematic practices will disappear. Under such circumstances, the additional imposition of written contracts would not appear to be supported by reasoned decisionmaking,[31] even if such imposition could pass constitutional muster.

The record demonstrates that there are other, less restrictive, regulatory options available to the Commission with respect to controlling or solving the "problems" of 800 information service provisioning. While U S WEST is not certain that each proffered alternative is technically or reasonably feasible,[32] the fact re-

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[29]Commentors suggest even other alternatives to the Commission's proposal. For example, suggestions that IPs be required to code their 800 information service calls in a manner that can be read by billing agents (see SNET at 6-7, Pa. Joint Commentors at 12-15); or that IPs should be expected to validate certain calls via LECs' Line Information Databases ("LIDB"); or should be accorded access to LECs' "900 blocking" databases; or that "presubscription scripts" be used by IPs not wishing to secure written agreements, are all alternatives worthy of further investigation. See Capital at 5-6; ITA at 4-7. And see AIP at 3-4.

[30]FNPRM, 75 Rad. Reg. 2d (P&F) 1250-51 ¶ 19. And see MCI at 7-8.

[31]MN-OAG argues that "[i]t is now apparent, that [a written agreement] requirement is necessary." MN-OAG at 16. MN-OAG is wrong. The market has not yet totally adjusted to the Commission's interpretative ruling; nor has the Commission experimented with other less-restrictive consumer protections. The most that can be said is that, in the absence of a written agreement requirement, some "IPs have freely disregarded the . . . criteria set forth for presubscription agreements." Id. That is no reason to impose, on a going-forward basis, an extremely burdensome business practice on the total industry.

[32]While not each (or all) of the suggestions of the various commentors may be technically feasible or reasonable from a business perspective (for example, Capital and ITA note that LECs have generally refused to provide access to their 900-blocking databases (Capital at 7-9; ITA at 8-9) -- certainly, the Commission should not mandate such access, at least not in the absence of a full hearing on the reasons for the refusal and the actual need for the access), the fact that they have been identified strongly suggests that the extremely burdensome constraints being suggested by the Commission have not been demonstrated to be either necessary or prudent with respect to their compelled imposition. For example, Capital's representation that LIDB validation queries have reduced its number of chargebacks by 60 percent (Capital at 7; and see ITA at 9-10), indicates that there are other le-

mains that the alternatives have been proffered. Before rejecting them, the Commission would clearly need to determine whether, in fact, they could operate in a way that would substantially (if not completely) "solve" the problem. If they would, U S WEST believes that the Commission is constitutionally required to impose them first, before proceeding to a solution whose speech and access repression is evident.[33]

III. CONCLUSION

U S WEST did not participate in the opening comment round in this proceeding. In large part, that decision was the result of the fact that we understood the subject matter of the docket to be one with respect to which there were very vocal and self-interested participants. As stated above, U S WEST has generally tried to be a party to the discussions under consideration in this proceeding through participation in industry discussions and more personal discussions with the IXCs for whom we bill and provide service.

While we believe that we have crafted a fair and lawful billing contract with respect to 800 information service billing, our ultimate business decision to remain

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gitimate ways by which the 800 service provisioning problem can be addressed and substantially resolved.

[33] See Capital at 4 (noting that "many IPs have complied with the Commission's rules, invested millions of dollars, and developed new technology to provide legitimate pay-per-call services using 800 access. If the Commission's proposed amendments are implemented, this investment becomes worthless."). And, U S WEST would add, the speech associated with that investment either does not occur at all, or is "inordinately and unreasonably delayed" (ITA at 9).

in that business will clearly be influenced by the Commission's ultimate resolution of the issues raised in this proceeding.

We comment in this reply round particularly to inform the Commission of our concern over certain endorsements about the manner in which the Commission has proposed it proceed, a manner that we believe has serious implications for <u>future</u> dockets and proceedings, dealing with matters unrelated to that under current consideration.

Information markets and information services are different than other markets and services. To the extent that what is trying to be controlled are "deceptive and fraudulent" practices, the expertise is lodged in the FTC. But, with respect to either regulatory body, the scope of the market protection cannot, under the First Amendment, veer too far from that reasonably necessary to address the problem. U S WEST believes that the Commission's current proposals go too far, in this regard.

While no party to this particular proceeding may deem it appropriate or worthy of the expenditure of resources (such expenditure, after all, being a matter of an internal cost/benefit analysis) to proceed with an appeal of the Commission's ultimate order, should that order either prohibit 800 information service billing on LEC bills or retain the proposal that written contracts must be demonstrated to exist before such billing takes place, at some time, in some docket, this kind of overbroad and overinclusive Commission-proposed resolution to market problems will be attacked and appealed. The Commission should take this opportunity to address the matter and should fashion a resolution to the instant problem in a manner most consistent with the First Amendment.

Respectfully submitted,

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October 31, 1994

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 31st day of October, 1994, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

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Kelseau Powe, Jr.

***Via Hand-Delivery**

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